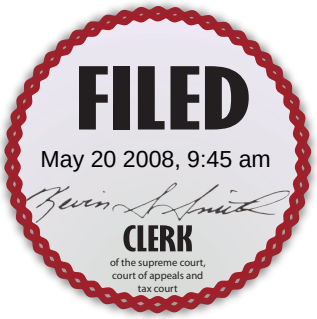

ATTORNEY FOR APPELLANT:

JEFFREY G. RAFF
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

THEODORE JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0709-CR-522
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No.02D04-0702-MR-1

May 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Theodore Johnson appeals his convictions of two counts of felony murder. On appeal, Johnson raises two issues, which we consolidate and restate as 1) whether sufficient evidence supports Johnson's convictions and 2) whether the trial court properly denied Johnson's motion for a mistrial. Concluding that sufficient evidence supports Johnson's conviction and that the trial court properly denied Johnson's motion for a mistrial, we affirm.

Facts and Procedural History

In the early morning hours of February 20, 2007, Keneisha Eley and her sister, Shaquela Hunter, were hanging out with five men – Derious Fuqua (Hunter's boyfriend), Percy Riley, Jonathan Rhodes, Antwain Hines, and Johnson – at Riley's cousin's apartment. The seven were getting along until Johnson removed a .38 handgun from his pocket and asked Rhodes if he wanted to play Russian roulette. Johnson then pointed the .38 at Eley, told her he could have "blew [her] head off," and punched her in the face. Transcript at 133. Eley went upstairs to wash her face because she had been crying and, shortly after she returned, Johnson announced he had to go to the bathroom. When Johnson said this, he looked at Hines, tapped his pocket where the .38 was located, and headed toward the bathroom. Convinced at this point that something was amiss, Eley followed Johnson, and the two argued in the bathroom. While they were arguing, Johnson removed the .38 from his pocket, and Hines entered the bathroom shortly thereafter, telling Johnson, "brother, it's going down." Id. at 142.

While Johnson, Eley, and Hines were in the bathroom, Rhodes stood up in the middle of the living room, pointed a .45 caliber handgun at Fuqua and Riley, and told them to empty their pockets. Fuqua and Riley complied, and Rhodes then told them to remove their clothes. When Johnson and Hines returned from the bathroom, Johnson joined Rhodes, pointed his .38 at Fuqua, and told Fuqua he did not like him, while Hines searched through several closets, by that time armed with a .44 caliber handgun he had found at some point during his search. Eley and Hunter escaped separately out the apartment's back door; Eley ran to a nearby residence and Hunter buried herself in a snow pile. Both of them heard three gunshots while outside. Fuqua was shot five times and died the following day. Riley was shot three times and died instantly. Both Fuqua and Riley had been shot with .38 and .45 caliber bullets.

The State charged Johnson with two counts of felony murder; two counts of robbery, both Class A felonies; and one count of unlawful possession of a firearm by a serious violent felon, a Class B felony. At trial, Eley and Hunter testified to the events described above, and the jury also heard testimony from investigating officers, crime scene technicians, and forensic pathologists. The jury found Johnson guilty on all counts. The trial court merged the robbery verdicts with the felony murder verdicts and entered judgments of conviction on the remaining verdicts. The trial court then sentenced Johnson to sixty-five years on each of the felony murder counts and to ten years on the unlawful possession of a firearm by a serious violent felon count, with each sentence to run consecutively. Johnson now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Johnson argues there was insufficient evidence to support his felony murder convictions. Our supreme court recently reiterated the standard of review to apply in examining a challenge to the sufficiency of the evidence:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis omitted).

To convict Johnson of felony murder in a case such as this one where the underlying felonies are robbery, the State was required to prove beyond a reasonable doubt that Fuqua and Riley were killed while Johnson, acting in concert with Hines and Rhodes, knowingly or intentionally took property from Fuqua and Riley by using or threatening the use of force or by putting them in fear. See Ind. Code §§ 35-42-1-1(2); 35-42-5-1. Johnson argues there was insufficient evidence that he acted in concert with Hines and Rhodes to rob Fuqua and Riley. To support this argument, Johnson claims that Eley and Hunter were mistaken when they saw him tap his pocket, and cites his own

testimony as proof of their mistake. Johnson also argues that although the evidence establishes he pointed his .38 at Fuqua and told Fuqua he did not like him, such evidence merely proves he intimidated and threatened Fuqua, not that he acted in concert with Hines and Rhodes to commit robbery.

Both of Johnson's arguments are problematic. The first one fails to consider our standard of review, which requires that we look only to the probative evidence and reasonable inferences supporting the verdict. See Drane, 867 N.E.2d at 146. Both Eley and Hines testified that Johnson looked at Hines and tapped his pocket before heading toward the bathroom. Eley was unsure whether the pocket Johnson tapped was the one that contained the .38, but Hines testified it was. This evidence supports the reasonable inference that by tapping his pocket, Johnson was signaling to Hines that he was ready to launch an attack on Fuqua and Riley. That Hines followed Johnson to the bathroom and told him, "brother, it's going down," tr. at 142, lends further support to this inference.

The second argument overlooks that Johnson's pointing a .38 at Fuqua and telling Fuqua he did not like him is not the only evidence he acted in concert with Hines and Rhodes. Indeed, the communication between Johnson and Hines mentioned above, evidence that Johnson was standing alongside Rhodes while the two pointed guns at Fuqua and Riley, and evidence that Fuqua and Riley were shot with bullets from .38 and .45 caliber handguns (the same caliber handguns Johnson and Rhodes were pointing), constitutes evidence from which the jury could have concluded beyond a reasonable doubt that Johnson, Rhodes, and Riley acted in concert to rob Fuqua and Riley. Thus, it follows that sufficient evidence supports Johnson's convictions of felony murder.

II. Motion for Mistrial

Johnson argues the trial court improperly denied his motion for a mistrial. The decision to grant or deny a motion for a mistrial is within the discretion of the trial court. Booher v. State, 773 N.E.2d 814, 820 (Ind. 2001). On appeal from the denial of a motion for a mistrial, the defendant must demonstrate that the conduct complained of was both error and had a probable persuasive effect on the jury's decision. Pierce v. State, 761 N.E.2d 821, 825 (Ind. 2002). In making this determination, we recognize that the trial court is in the best position to evaluate the conduct's impact on the jury, and therefore afford great deference to the trial court's decision. Booher, 773 N.E.2d at 820.

On the second day of trial, Johnson moved for a mistrial on the grounds that his constitutional rights to confront the witnesses against him and to effective assistance of counsel were violated because he and his counsel were unable to hear portions of Eley's and Hunter's testimony from the previous day.[1] We note initially that Johnson's confrontation clause violation is misplaced; that provision grants the defendant "the right physically to face those who testify against him, and the right to conduct cross-examination," Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987), and Johnson does not argue that either of these guarantees were denied. To establish a denial of effective assistance of counsel, Johnson must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252

[1] We will assume Johnson is arguing federal constitutional violations, as he did not state at trial or on appeal that his inability to hear Eley's and Hunter's testimony also violates similar guarantees under the Indiana Constitution. See Richardson v. State, 800 N.E.2d 639, 647 (Ind. Ct. App. 2003) (stating that the failure to make a separate argument regarding the violation of a state constitutional provision results in the waiver of such argument on appeal), trans. denied.

(Ind. 2003). First, the defendant must show counsel was deficient. Id. "Deficient" means that counsel's errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as "counsel" within the meaning of the Sixth Amendment. Id. Second, the defendant must show that counsel's deficiency resulted in prejudice. Id. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We need not address whether counsel's performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Although our supreme court has stated that "a defense attorney who is unable to hear [] testimony may amount to ineffective assistance of counsel," Grund v. State, 671 N.E.2d 411, 417 n.4 (Ind. 1996), we are not convinced Johnson has established that counsel was ineffective. The record indicates that despite an objection during Eley's testimony, see tr. at 131 ("Excuse me. She's right on the edge of me not hearing her, could you caution her perhaps."), Johnson's counsel was not prevented from conducting an effective cross-examination. Indeed, among other things, Johnson's counsel secured admissions from Eley that she had been drinking alcohol throughout the evening and that she did not know if the pocket Johnson tapped was the same one that contained the gun. As to Hunter's testimony, the record indicates that early in her direct examination, Johnson and his counsel repositioned themselves in an effort to hear her testimony more clearly. See id. at 177 ("COURT: If you and your client were to pull up a chair, would that work better? [Johnson's Counsel]: Let's give it a try."). That Johnson's counsel

made no further objections after this point indicates he was able to hear the remainder of Hunter's testimony adequately. Moreover, as the State points out, the trial proceedings have since been transcribed, and Johnson has not cited to any exchange to which his counsel would have objected had he been able to hear. We think a claim of ineffective assistance counsel predicated on counsel's inability to hear testimony should include this type of showing. Cf. Crain v. State, 736 N.E.2d 1223, 1240 (Ind. 2000) (concluding the defendant's claim of ineffective assistance of counsel based on counsel's alleged failure to communicate with him adequately lacked merit because "[d]efendant cites to no evidence in the record establishing trial counsel's failure to communicate with him nor does he show in any way how [he] was prejudiced by a lack of communication"). Thus, because Johnson cannot establish that his constitutional rights were violated based on an inability to hear Eley's and Hunter's testimony, it follows that the trial court did not abuse its discretion in denying his motion for a mistrial.

Conclusion

We conclude that sufficient evidence supports Johnson's convictions of felony murder and that the trial court properly denied Johnson's motion for a mistrial.

Affirmed.

BAKER, C.J., and RILEY, J., concur.